NO. 10-565

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY P. L. TIBBETTS,
Petitioner

v.

JAMES DITTES, DWAYNE HUEBNER, THOMAS OGLETREE, JAMES GARRETT, HARRY ADAMS, PENELOPE LAURENS, DETRA MACDOUGALL AND THE YALE CORPORATION

Respondents.

Supreme Court, U.S.
FILED
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MOTION FOR REHEARING ON PETITION FOR CERTIORARI FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED ON REHEARING

Under 28 U.S.C. § 2072, where Congress authorized the Supreme Court with supervisory "power to prescribe general rules of practice and procedure" in the local rules of courts of appeals so that they do "not abridge, enlarge or modify any substantive right," and

Where the Local Rules of the U.S. Court of Appeals for the Second Circuit do not have any published "notice" procedures for pro se-to-counseled adjudications, and

Where the Second Circuit Forms C and D continue to remain contradictory and require a retroactive appearance for newly-retained counsel in pro se appeals:

1. Is the Due Process Clause controlling where the Petitioner did not receive any published "notice" requirements, prior to an entry of default, and the Fifth Amendment specifically states that "*No person* . . . shall be deprived of life, liberty or property without due process of law"?

2. Does 28 U.S.C. § 2072 confer mandatory supervisory jurisdiction and "power" on the U.S. Supreme Court to review the local rules of lower courts so that they do "not abridge, enlarge or modify any substantive right"?

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4. Under 28 U.S.C. §§ 331, does the Judicial Conference of the United States have concurrent jurisdiction to "review rules prescribed under section 2071 of this title . . . for consistency with federal law"?

5. Is the Chief Justice of the Supreme Court, who is also Chair of the Judicial Conference of the United States, obligated to report defective or deficient "notice" procedures in the local rules of a U.S. court of appeals to the Judicial Conference, so that it may carry on its "continuous study of the operation and effect of the general rules of practice and procedure" in the courts of the United States?

6. Is the Chief Justice of the Supreme Court obligated to inform the Judiciary Committees of the United States Congress over defective, deficient "notice" requirements in the Local Rules of the Second Circuit, so that steps may be taken to bring these rules in compliance with 28 U.S.C. § 2072(b)?

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CITATION OF OPINIONS BELOW

This Motion for Rehearing seeks review of the Supreme Court's decision, dated December 13, 2010, declining to review this Petition. The decision is reprinted on the U.S. Supreme Court website at http://www.supremecourt. gov/docket/docket.aspx

JURISDICTIONAL STATEMENT

The Court continues to have jurisdiction pursuant to 28 U.S.C. § 1254(1), 28 USC § 2071, 2072, and Article III of the U.S. Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Motion for Rehearing involves Article III of the U.S. Constitution, the Due Process Clause of the Fifth Amendment, the Enabling Rules Act under 28 USC §§ 2071-2077, and the concurrent jurisdiction of the Judicial Conference of the United States, under 28 U.S.C. §§ 331.

I. STATEMENT OF REHEARING

In accordance with Supreme Court Rule 44(2), this Motion for Rehearing timely sets forth "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented."

II. DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS STILL CONTROLLING

The Due Process Clause of the Fifth Amendment unequivocally states that "No person shall. . . be deprived of life, liberty, or property, without due process of law." The phrase "No person" means exactly that, *no person*, including this Petitioner.

The essential maxim of the "due process of law" is that "individuals must receive notice and an opportunity to be heard before the government deprives them of property." *United States v. $ 8,850,*

461 U.S. 555, 562 (1983). In any situation regarding government-sponsored deprivation, the government must furnish "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 315 (1950).

In order to pass constitutional muster, "notice" must state 'where' and at 'what time' a party is to proceed; it must also provide the "legal consequences [that] may ensue" for a failure to act. *Fuentes v. Shevin,* 407 U.S. 67, 79 (1972). As a final threshold issue, due process must be "flexible," calling "for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Once it is determined that the Due Process Clause applies--no court of law may "constitutionally

authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Vitek v. Jones*, 445 U.S. 480, 490 (1980).

In this case, the Second Circuit (1) failed to furnish "notice" requirements regarding the application of Forms C and D, (2) defaulted the Petitioner without identifying any applicable "notice" requirements, and (3) deprived the Petitioner of his property right on appeal. The Supreme Court declined to review the Petitioner's due process violation and the insufficient "notice" requirements in the Second Circuit Local Rules on December 13, 2010. This Motion for Rehearing now follows.

III. THE RULES ENABLING ACT (28 U.S.C. §§ 2071-2077) IS A CONTROLLLING STATUTE

In 1934, the United States Congress passed the Rules Enabling Act (28 U.S.C. §§ 2071-2077), which today provides a uniform framework for all

rule-making in the federal court system. Section 2071 of this Act provides that:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Congress further intended that the Supreme Court have mandatory "power" to supervise the integrity of this federal rule-making process, as well as the *actual content of the general "rules of practice and procedure"*:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

It is clear that Congress intended for the Supreme Court to continuously and constantly monitor and supervise the rule-making apparatus of

the federal judiciary, and ensure to Congress that the "rules of practice and procedure" of the U.S. district courts and courts of appeal do "not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b).

The legislative history of the Rules Enabling Act *confirms* that the Supreme Court is intended to be the final authoritative voice on all matters pertaining to court rules in the federal judiciary. As recorded on the U.S. Senate floor, the Houses of Congress have:

> neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity of amendment or change . . . for the obvious reason that the professional nature of the task would leave the legislature little time for matters of substance and statesmanship. [Senate Report, 1608, 80th Congress, June 1, 1948.]

Undeniably, then, 28 U.S.C. § 2072 extends broad "power[s]" to the Supreme Court to exercise

continuous vigilance and supervision over the local rules of *all* inferior courts, so that they are "consistent with Acts of Congress," and that they do "not abridge, enlarge or modify any substantive rights." 28 U.S.C. § 2072(b). In short, "discretion" plays no part in whether the Supreme Court should review defective notice procedures; Congress clearly intended that 28 U.S.C. § 2072 be mandatory in the review of local court rules.

A. Court's Discretionary Standard Does Not Supersede Mandatory Supervision Under Section 2072

In June 1988, Congress amended this Court's jurisdiction by passing a law "to provid[e] greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes." Public Law 100-352 (102 STAT 662). While this law was intended "to improve the administration of justice," it certainly does not supersede the Court's mandatory

jurisdiction over Article III controversies, or other statutory jurisdictions conferred by Congress, such as the Court's mandatory supervision over the general rules of practice and procedure of the lower courts, pursuant to 28 U.S.C. § 2071 *et seq.*

Historically, of all the cases the Supreme Court hears, only an average of .04% involve due process violations.[1] Further, a LEXIS search shows that the Supreme Court has *never* heard a case involving due process violations, stemming from defective "notice" requirements in the local rules of a U.S. Court of Appeals. Indeed, the underlying facts in this case are extremely rare.

It is conceivable the Supreme Court could use "discretion" in declining to not review a case involving a due process violation and defective

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1 Supreme Court Compendium: Data, Decisions & Developments, http://library.cqpress.com.

"notice" requirements in the local rules. But this would *only* apply if the lower court had taken great pains to conduct a fact-finding to show the Supreme Court and Judicial Conference of the United States that the "due process of law" had been effected, and the local rules were in compliance with 28 U.S.C. §2072(b).

Such is *not the case here.* The Second Circuit undertook no "procedural safeguard[s]" to ensure the "due process of law" had been satisfied. This fatal flaw now *prohibits* the Supreme Court from declining to review this case, because the Fifth Amendment is absolutely controlling: "*No person* shall. . . be deprived of life, liberty, or property, without due process of law."

Second, *where it remains an open question whether notice* was furnished in the case below, Petitioner's underlying judgment continues to be

"void" for a due process violation.[2] The Supreme Court, therefore, is obligated to conduct a fact-finding on this outstanding due process violation, and to fail to do so would be a gross abdication of this Courts' preeminent constitutional responsibilities.

Finally, it is simply premature for the Supreme Court to certify to Congress that the Local Rules of the Second Circuit are *in compliance with 28 U.S.C. §2072(b).* At best, there is a *presumption* that these rules are in compliance with 28 U.S.C. §2072(b). At worst, the existence of insufficient "notice" requirements in the Local Rules of the Second Circuit are in violation of the Due Process and Equal Protection Clauses of the Fifth

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2. *See United Student Aid Funds v. Espinoza*, 130 S.Ct. 1367, 1377 (2010)(A void judgment "applies only in the rare instance where a judgment is premised . . . on a violation of the due process of law that deprives a party of notice or the opportunity to be heard.") (Justice Thomas writing for the majority).

Amendment.[3] If this factual finding is true, then permitting the continued existence of unconstitutional court rules, could raise alarm bells for the public and the United States Congress.

In the final analysis, even if this Court were to toss out all due process violations here, 28 U.S.C. § 2072(b) still *requires* that the Court certify to Congress that these rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Without any judicial fact-finding on this matter, it would be foolhardy make such a *presumption* and representation to Congress, that the local rules of all lower courts are in compliance 28 U.S.C. § 2072(b). Notwithstanding, without any fact-finding on this matter, if the Supreme Court should ultimately

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3. It should be instructive, here, that in seven years of litigation below, neither the Second Circuit, nor the Respondents, made any showing that (a) the Petitioner had received sufficient "notice," or (b) the court's insufficient notice requirements do *not* violate the Due Process Clause of the Fifth Amendment.

decline to review the arguably defective Local Rules of the Second Circuit, then this matter of public concern and constitutional importance must be presented to the United States Congress.

B. Petitioner Satisfies Standard For Review of Local Rules under Section 2072

In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (*per curiam*), this Court set forth a test for perceived constitutional infractions of federal rules. Where ever there is an allegation that a rule "offends" an important right, *Sibbach* establishes that "the test must be whether a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14. Last year, as this Court upheld in *Shady Grove Orthopedic v. Allstate*, the test is not:

> whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself *regulates:* If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights, it is not." [*Shady Grove Orthopedic*, 130 U.S. 1431, 1442 (2010) (quoting *Sibbach*, 312 at 446)].

For seven decades this Court has "reaffirmed repeatedly that the validity of a Federal Rule depends entirely upon whether it regulates procedure." *Id.* at 1444. If it does not, and that rule seeks to 'abridge, enlarge or modify any substantive right,' then the "*federal rule cannot govern.*" *Id.* at 1436 (emphasis added).

Here, Petitioner unequivocally asserts that the Local Rules of the Second Circuit fail to furnish any "notice" requirements for the adjudication of pro se-to-counseled appeals. If the Petitioner is right, and these local rules do not furnish these basic notice

requirements, then under the Supreme Court's analysis in *Sibbach* and *Shady Grove Orthopedic*, such local rules cannot "regulate procedure," because, in fact, *such procedure is vague, non-existent, or standardless. See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (a rule "fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.") (Justices Breyer, Ginsburg and Souter concurring).

IV. PETITIONER SATISFIES REQUIREMENTS FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10(a)

Supreme Court Rule 10(a) specifies that "[a] petition for a writ of certiorari will be granted" where "a U.S. court of appeals has entered a decision" that has "departed from the accepted and usual course of judicial proceedings."

Here the Second Circuit has held that a default judgment may be entered without furnishing any published "notice" requirements for its proscribed conduct. As set forth below, there are three essential maxims of well-settled law wherein the Second Circuit has "departed from the accepted and usual course of judicial proceedings." SC Rule 10(c).

1. **Entry of a Default Judgment**

In the decisive case of *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) *(per curiam)*, this Court emphasized that the harsh and "draconian" sanctions of a default may only lie to penalize a party's "flagrant bad faith" or "callous disregard" of rules or orders. Before a court may enter a default, it must undertake a "careful[] review [of] the record" and present "findings of historical

fact" to support a party's "willful or intentional" misconduct. *Id.* at 641.

Accordingly, *National Hockey League* has been cited, followed or distinguished in 3091 cases. Since 1976, the Supreme Court has cited *National Hockey League* in seven subsequent cases. The U.S. courts of appeals have cited *National Hockey League* in 569 cases.[4]

In this case, the Second Circuit has declined to make any fact-finding of "flagrant bad faith" or "callous disregard" to support the entry of a procedural default. The Second Circuit's failure to make a fact-finding in line the Supreme Court's guidance in *National Hockey League* represents a

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4 *National Hockey League* is cited, followed or distinguished by the circuit courts of appeals as follows: First Circuit--56 cases; Second Circuit--42 cases; Third Circuit--44 cases; Fourth Circuit--35 cases; Fifth Circuit--45 cases; Sixth Circuit--63 cases; Seventh Circuit--66 cases; Eighth Circuit--23 cases; Ninth Circuit--94 cases; Tenth Circuit--45 cases; Eleventh Circuit--25 cases; DC Circuit--19 cases; and Federal Circuit--12 cases.

"depart[ure] from the accepted and usual course of judicial proceedings," and "call[s] for an exercise of this Court's supervisory power." SC Rule 10(a).

2. 'Set Aside' of Judgment With a Due Process Violation

In the pivotal case of *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Supreme Court unanimously held that the only "remedy" for a due process violation is to grant the "motion to set aside the decree and consider the case anew." *Id* at 552. "Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Id.* at 552.

Armstrong is cited, followed or distinguished in 3241 cases. Since 1965, the Supreme Court has cited *Armstrong* in 37 subsequent cases. The U.S.

courts of appeals have cited, followed or distinguished *Armstrong* in 568 cases.[5]

Undeniably, where *Armstrong* is cited in 3241 cases, and the Second Circuit avoided any discussion or mention of the controlling principles in *Armstrong*, such a radical "depart[ure] from the accepted and usual course of judicial proceedings," calls "for an exercise of this Court's supervisory power." SC Rule 10(a).

3. Second Circuit Ruling Raises "An Important Question of Federal Law" That Has Not Been Settled

Supreme Court Rule 10(c) provides that "[a] petition for a writ of certiorari will be granted" where "a United States court of appeals has decided an

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5 *Armstrong* has been cited, followed or distinguished in the courts of appeals as follows: First Circuit--13 cases; Second Circuit--29 cases; Third Circuit--26 cases; Fourth Circuit--18 cases; Fifth Circuit--29 cases; Sixth Circuit--26 cases; Seventh Circuit--33 cases; Eighth Circuit--21 cases; Ninth Circuit--35 cases; Tenth Circuit--31 cases; Eleventh Circuit--11 cases; DC Circuit--16 cases; and Federal Circuit--3 cases.

important question of federal law that has not been, but should be, settled by this Court." SC Rule 10(c).

In the case, the Second Circuit decided an important question over Federal Rule of Appellate Procedure 47(b), and concluded that a circuit court can enter a procedural default against a litigant, without furnishing any published "notice" requirements in its local rules.

FRAP 47(b) prescribes that:

> No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement. [FRAP 47(b)].

Despite this clear prohibition against an arbitrary and capricious enforcement of local rules, the Second Circuit has acted with impunity to "impose" the harsh "sanction" of a procedural default for "noncompliance," in which there is no *"actual*

notice requirements" in the local rules. From 2003 to 2008, the Second Circuit has turned a blind-eye to the notice deficiencies in its own local rules, causing a "party to lose rights." FRAP 47(b).

The Supreme Court has never decided this type of case, "but [clearly it] should." The Supreme Court has only mentioned FRAP 47(b)in three cases *in dicta*. The U.S. courts of appeals have only sparsely mentioned the language requirements of FRAP 47(b). To date, there has been no case on record on whether a court of appeals can impose a "sanction" or default, without "actual notice requirements." As it now stands this case represents a complete derogation of the congressional intent of FRAP 47(b), and it raises an "important question of federal law" that "should be settled by this Court." SC Rule 10(c).

VII. JUDICIAL CONFERENCE OF THE UNITED STATES HAS CONTROLLING INTERESTS UNDER 28 U.S.C. § 331

In 1922, Congress created the Judicial Conference of the United States, with the primary objective for framing uniform policy guidelines and making recommendations on a wide-range of rules, practices and procedures for the federal courts of the United States. Its specific enumerated responsibilities include to (1) "make a comprehensive survey of the condition of business in the courts of the United States," (2) "submit suggestions and recommendations to various courts to promote uniformity of management procedures," (3) "hold hearings, take sworn testimony, issue subpoenas and subpoenas *duces tecum*, and make necessary and appropriate orders in the exercise of its authority," and (4) recommend improvements to rules without

the force of law and "modify or abrogate any such rule so reviewed," or "found inconsistent in the course of such review." 28 U.S.C § 331.

The composition of the Judicial Conference consists of "the Chief Justice of the United States," as Chair, along with representative chief judges from all federal circuits, as well as other judicial experts and professors of law. The Chief Justice is authorized to appoint individuals to standing committees of the Conference, which, in turn, will "review rules prescribed under section 2071 . . . for consistency with federal law." *Id.*

A. Petitioner Requests Referral to the Judicial Conference for a Fact-Finding Study on Notice Deficiencies in the Local Rules of the Second Circuit

Where the United States Congress has specifically entrusted the Judicial Conference to "review rules prescribed under section 2071 . . . for

consistency with federal law," Petitioner respectfully requests that the Chief Justice refer this case to the appropriate rules and procedures committee of the Judicial Conference, for a fact-finding on whether the lack of notice procedures for pro se-to-counseled appeals in the Second Circuit are "consisten[t] with federal law." 28 U.S.C § 331.

Petitioner's request for review by the Judicial Conference is further appropriate where (1) the Supreme Court exercises "power" to "prescribe general rules of practice and procedure" for cases in the "courts of appeals," (2) Petitioner has shown that this matter satisfies the standard for review *Sibbach* and *Shady Grove Orthopedic*, (3) a fact-finding would satisfy the need for a "procedural safeguard" in this

case,[6] (4) an objective fact-finding would satisfy the requirements for the "due process of law," [7] (5) an objective fact-finding is in the public's best interest[8], and (6) the Supreme Court is authorized to "issue all writs necessary or appropriate in aid" of its "respective jurisdictions" under 28 U.S.C. § 1651(a).

Unquestionably, the assistance of the Judicial Conference in this fact-finding will greatly aid the jurisdiction of the Supreme Court in discharging its supervisory role under Section 2072(b). This is all

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6. The "controlling weight" in assessing the need for a "procedural safeguard," vis-à-vis protecting a constitutional right, is the "administrative burden" on the government. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). In this case, there is no "administrative burden" to have the Judicial Conference conduct a fact-finding on whether the local rules are "consisten[t] with federal law," since this is their appointed and statutory function under 28 U.S.C. § 331 anyways.

7. *See Caperton v. Massey*, 129 S.Ct. 2252, 2262 (2009)("Due process requires an objective inquiry" and "procedure for judicial factfinding.") (Justices Souter, Ginsburg and Breyer concurring in majority opinion).

8. *See Santosky v. Kramer*, 445 U.S. 745, 755 (1982) ("judicial factfinding" is in the best interests of society and "instructs degree of confidence our society thinks [it] should have in the correctness of factual conclusions").

the more true where the Supreme Court is busy with many pressing issues, and the time-requirement to undertake this fact-finding is not necessarily the best use of this Court's valuable resources or judicial staffing requirements.

If, during the course of this Judicial Conference review, it should be determined that the Local Rules of the Second Circuit furnish constitutionally-sufficient notice requirements for all litigants, then this Petition may be dismissed, without further review or action. Conversely, if, in the course of this review, it should be determined that there are notice deficiencies in the Local Rules of the Second Circuit, then the appropriate rule-making apparatus will already be engaged under 28

U.S.C §§2073-2077,[9] and the Supreme Court may then issue whatever writs are necessary to remedy outstanding due process violations, and work jointly with the Judicial Conference and the Second Circuit to recommend revisions or amendments to Congress, so that these local rules may be brought into compliance with 28 U.S.C § 2072(b).[10]

In either event, a fact-finding by the Judicial Conference will be authoritative, and it will fulfill this Court's supervisory "power" in ensuring the local rules of all U.S. courts of appeals are "consistent with Acts of Congress" and that these "rules shall not

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9 Section 2073 provides, in pertinent part, that "[t]he Judicial Conference may authorize the appointment of a standing committee to assist the Conference in recommending rules to be prescribed under sections 2072 and 2075 of this title. Each such committee shall consist of members of the bench and professional bar; and trial and appellate judges."

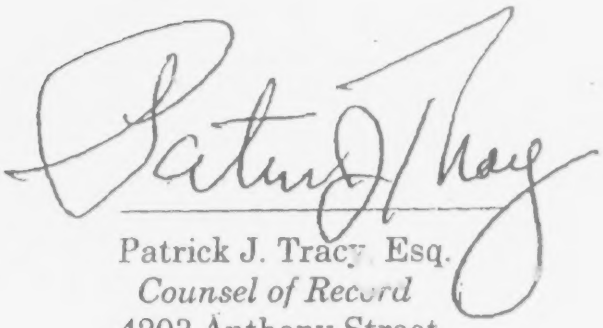
10. Alternatively, these "notice" discrepancies in the Local Rules of the Second Circuit could be brought to the attention of the Judiciary Committees of the United States Congress, specifically the House or Senate Subcommittees on The Constitution for hearings and enforcement legislation, where necessary.

abridge, enlarge or modify any substantive right," protected under the U.S. Constitution or Bill of Rights.

VIII. CONCLUSION

WHEREFORE, for all of the foregoing reasons, this Petition for Writ of Certiorari should be deferred, tabled and/or postponed, pending a referral by Chief Justice Roberts to the appropriate rules and procedure committee of the Judicial Conference of the United States, for a fact-finding and recommendation on this matter to the Supreme Court and the United States Congress, if necessary.

Respectfully submitted.



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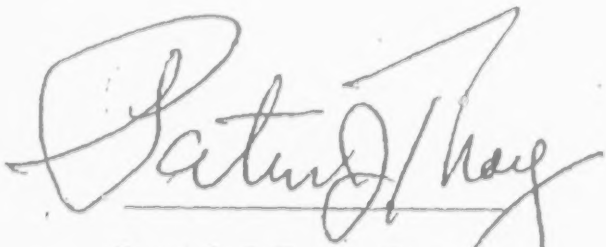
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 33(1)(h) of the Supreme Court Rules, it is hereby certified that the word count of this petition is 2965 words. The word count was acquired on Microsoft Office Word 2007, to include footnotes. The word count excludes the text of constitutional provisions, statutes, and regulations, which is 758 words, as permitted under Rule 14 (1)(f) and Rule 33(1)(d).



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(301) 897-8298

CERTIFICATE OF COMPLIANC

Pursuant to Rule 44 of the Supreme C

Rules, it is hereby certified that this Motion

Rehearing sets forth "intervening circumstan

substantial or controlling effect" or "other sut

grounds not previously presented."

Patrick J. Tracy, Esq.
Counsel of Record
4203 Anthony Street
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